NO. 20216

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEX TORRES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I.

JURISDICTIONAL STATEMENT

The appellant, Alex Torres, and co-defendant, Paul Garcia,[1/] were each charged in a three-count Federal Grand Jury Indictment filed in the Southern District of California, Central Division, on February 10, 1965, with violations of Title 21, United States Code, Section 174, and Title 26, United States Code, Sections 4704(a), 7237 [C. T. 2]. [2/]

Count One charged that on or about September 25, 1964, appellant and co-defendant Garcia knowingly and unlawfully received,

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1/ Also known as Raul Garcia (Reporter's Transcript, pp. 10, 104).

2/ "C. T." refers to Clerk's Transcript.

concealed, and facilitated the concealment and transportation of a specified quantity of heroin.

Count Two related to the same quantity of heroin and the same date mentioned in Count One and charged that appellant and Garcia sold and facilitated the sale thereof.

Count Three related to the same quantity of heroin and the same date mentioned in Counts One and Two of the Indictment and charged that appellant and Garcia knowingly and unlawfully sold and distributed heroin which was not then and there from its original stamped package and was not in its original stamped package.

On February 23, 1965, appellant Torres was arraigned before the Honorable Charles H. Carr, United States District Court Judge. Appellant was represented by his attorney, Frank Duncan, and entered a plea of not guilty to the three counts of the Indictment [C. T. 5].

On April 12, 1965, co-defendant Garcia entered a plea of guilty to Count Three before the Honorable Charles H. Carr [R. T. 10]. 3/ The appellant was tried alone on April 14, 1965, before the Honorable Ray McNichols, United States District Court Judge, jury having been waived. The appellant was found guilty as charged in the three-count Indictment [C. T. 11]. On April 15, 1965, Findings of Fact were filed by the Court [C. T. 12]. On April 22, 1965, the appellant was sentenced to the custody of the Attorney General for a period of five years on Counts One and Two and for a period of two years on Count Three; said sentences on Counts Two and Three

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3/ "R. T." refers to the Reporter's Transcript.

to run concurrently with the sentence imposed on Count One [C. T. 16].

A timely Notice of Appeal was filed by the appellant on April 30, 1965 [C. T. 17].

The offenses occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, Title 21, United States Code, Section 174, and Title 26, United States Code, Sections 4704(a), 7237. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II.

STATUTES INVOLVED

Title 21, United States Code, Section 174 provides in pertinent part:

> "Whoever . . . knowingly . . . receives, conceals, buys, . . . sells, or in any manner facilitates the transportation, concealment, or sale or any such narcotic drug after being imported, . . . knowing the same to have been imported . . . into the United States contrary to law, . . . shall be imprisoned not less than 5 or more than 20 years, and in addition, may be fined not more than $20,000."

Title 26, United States Code, Section 4704(a) reads in pertinent part as follows:

" . . . It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this sub-section by the person in whose possession the same may be found."

III.

STATEMENT OF THE FACTS

In July, 1964, negotiations for the purchase of heroin began between co-defendant Raul Garcia and agent Chris V. Saiz of the Federal Bureau of Narcotics [R. T. 58]. Agent Saiz assumed an undercover identity as Chris Chavez, a purchaser of heroin from Albuquerque, New Mexico [R. T. 12, 62]. A meeting took place at Garcia's residence on the night of September 24, 1964, between Garcia and agent Saiz. Garcia did not have the heroin at this time but arranged to get it the following night. Garcia was paid $100.00 by agent Saiz for the purchase of the heroin [R. T. 12, 58, 60].

On the night of September 25, 1964, Garcia and undercover agent Saiz proceeded to Rocha's Bar for the express purpose of

meeting Garcia's source of supply of heroin [R. T. 15, 61]. At about 9:50 p. m., appellant Alex Torres entered the bar and met with Garcia and agent Saiz. During a brief conversation between Garcia, appellant and agent Saiz, appellant stated that he did not have any heroin with him, but that he could get it. Appellant inquired as to how much heroin agent Saiz wanted, and when told by Garcia, $200. 00 worth, appellant said that he could sell them one-quarter of an ounce. Agent Saiz agreed to purchase this amount from appellant. Thereafter, as agent Saiz testified, appellant told Garcia, " 'Well, let's you and I go get the stuff' or heroin, 'and he [Saiz] will remain here.' " Appellant then left the bar [R. T. 16, 17, 62].

Torres and Garcia were under the surveillance of agent Briggs as Torres drove his car to a residence on Rich Street in Los Angeles [R. T. 96-97]. Torres then left the automobile and proceeded to a side door of a building while Garcia waited in the car [R. T. 17, 96, 97]. Torres returned to the car a few minutes later, dropped some balloons into Garcia's hand and said "Here is the stuff" and then he and Garcia drove back to Rocha's Bar [R. T. 17, 97].

At approximately 11:10 p. m., appellant and Garcia arrived back at Rocha's Bar with the heroin and met again with undercover agent Saiz. Appellant at this time apologized for not having the amount wanted but told Garcia, in Saiz' presence, that he (appellant) "would be able to get it if given more time" [R. T. 19, 63].

While leaving the bar, agent Saiz told appellant, "Well, the

trip wasn't entirely in vain . . . I did have a quarter of an ounce" and appellant responded "Well, maybe the next time you come I can have the whole amount for you" [R. T. 19, 63].

Outside of the bar Garcia and agent Saiz spoke together and thereafter Garcia handed a Salem cigarette package to agent Saiz containing eight rubber balloons of heroin [R. T. 20, 64].

IV.

ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal: 4/

1. "The Motion for a New Trial should have been granted, since the Government's case rested largely upon the testimony of an informer-accomplice, Raul Garcia, whose reliability and degree of credibility was severely attacked by the trial court."

2. "No actual or constructive possession were established; at the very best, only a conspiracy between appellant and the informer to obtain narcotics, and the informer having been given immunity, the Government did not prosecute the conspiracy charge."

4/ Appellant's Opening Brief, p. 3.

V.

ARGUMENT

A. DENIAL OF MOTION FOR A NEW TRIAL WAS PROPER.

It is a well settled rule that a motion for a new trial is directed to the sound discretion of the trial court. The trial court's ruling, in denying a motion for a new trial will not be disturbed in the absence of a clear abuse of that discretion.

Talon, Inc. v. Union Slide Fastener, Inc., 266 F. 2d 731 (9 Cir. 1959);

Lavine v. Jamison, 230 F. 2d 909 (9 Cir. 1956);

Jayson v. United States, 294 F. 2d 808 (5 Cir. 1961);

Davis v. Yellow Cab Co. of Petersburg, 220 F. 2d 790 (5 Cir. 1955).

In the case at hand, the trial court was satisfied that the appellant had had a fair trial and that, upon the issue of credibility, appellant had had every opportunity to present his side of the story to the court. Thus, no abuse of discretion by the trial court in overruling the motion for a new trial, has been established.

Harper v. United States, 296 F. 2d 612 (9 Cir. 1961);

La Porta v. United States, 266 F. 2d 645 (5 Cir. 1959).

Appellant's argument that the trial court should have granted a new trial is founded on the premise that Garcia, labelled erroneously by appellant as an "informer-accomplice", was not reliable and that the court did not in fact believe him. Initially, it

should be pointed out that Garcia is not an "informer". Garcia was at all times an accomplice and co-defendant in this case [R. T. 10]. He was arrested [R. T. 23] and indicted along with the appellant [C. T. 2]. The fact that he voluntarily pleaded guilty and testified against the appellant and was sentenced separately does not establish, as appellant contends, that the witness testified falsely. Nor has there been any showing of bias on the part of Garcia inasmuch as he testified that no promises had been made to him in return for his testimony [R. T. 46].

United States v. Aviles, 274 F. 2d 179,
cert. den. 362 U. S. 974.

Appellant quotes the trial court (p. 8, Appellant's Brief), in support of his allegation. However, appellant failed to quote the sentence immediately following which reads as follows:

> "However, with the testimony of the Agent Saiz as to what he overheard and tying it together, I think the government made out its case." [R. T. 149; Emphasis added].

Thus, since Garcia's testimony was corroborated by agent Saiz, and by agent Briggs, the court did in fact consider his testimony, at least to this extent, trustworthy.

When questions of credibility and weight of the evidence are involved, the verdict of the trial court will not be disturbed on appeal since it is not the function of the appellate courts to weigh the evidence or to determine the credibility of the witnesses.

Sandiz v. United States, 239 F. 2d 239 (9 Cir. 1956);

Penosi v. United States, 206 F. 2d 529 (9 Cir. 1953);

Lutfy v. United States, 198 F. 2d 760 (9 Cir. 1952);

United States v. Coduto, 284 F. 2d 464 (7 Cir. 1960);

United States v. Bailey, 277 F. 2d 560 (7 Cir. 1960).

The Government respectfully submits that the District Court's denial of appellant's Motion for a New Trial was proper and should not be overruled on appeal.

B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION.

On appeal from a conviction, the evidence and all inferences which may be reasonably drawn therefrom, are to be viewed in the light most favorable to the Government.

Noto v. United States, 367 U. S. 290 (1961);

Byrne v. United States, 327 F. 2d 825 (9 Cir. 1964);

White v. United States, 315 F. 2d 113 (9 Cir. 1963);

Mosco v. United States, 301 F. 2d 180 (9 Cir. 1962);

Bolin v. United States, 303 F. 2d 870 (9 Cir. 1962).

In the present case, the evidence was sufficient to support the verdict of guilty inasmuch as the Government did prove all of the essential elements of the crimes charged; the testimony of the co-defendant-accomplice was corroborated; the trier of fact believed beyond a reasonable doubt that the appellant had had possession of, and was instrumental in the sale of the heroin.

1. The Government Did Prove All Of The Essential Elements Of the Offenses Charged.

To facilitate in any manner, the transportation, concealment, or sale of heroin means to willfully do any act which makes less difficult in any way the concealment, transportation, or sale of the heroin.

Vasquez v. United States, 290 F. 2d 897 (9 Cir. 1961);

Bruno v. United States, 259 F. 2d 8 (9 Cir. 1958);

Pon Wing Quong v. United States, 111 F. 2d 751 (9 Cir. 1940).

The summary of the evidence offered by the Government and believed by the Court in the present case clearly establishes that the appellant offered to sell a quarter ounce of heroin to the undercover agent [R. T. 62]; that the appellant drove his car to and from the place where the heroin was picked up [R. T. 17, 18]; that the heroin was not then and there in or from its original stamped package [R. T. 18]; that the appellant knowingly and willfully participated in the illicit sale and distribution of the heroin, since appellant indicated that he could get the "stuff" or heroin [R. T. 62], and also offered to "get more heroin next time" [R. T. 63].

In addition, subsequent to the September, 1964, sale, another meeting took place in January, 1965, between agent Saiz, co-defendant Garcia, and appellant [R. T. 67]. At this time, agent Saiz asked appellant how much the heroin was going to be and appellant replied that "it would be approximately the same price as

the last heroin", referring to the September 25, 1964, sale. Agent Saiz indicated, at this time, that the price had been too high on the previous sale to which appellant replied that he "would have to confer with his connection and see how much he could get it for." [R. T. 68]. This clearly establishes appellant's willingness and intent to deal in the illicit sale of the heroin as charged in the indictment.

It is respectfully submitted that the Government has carried the burden of proving every essential element of the offense charged beyond a reasonable doubt.

2. The Testimony Of The Co-Defendant-Accomplice Was Corroborated and Reliable.

This Court has repeatedly held that the testimony of an accomplice does not require corroboration.

Marcella v. United States, 285 F. 2d 322 (9 Cir. 1960);

Channel v. United States, 285 F. 2d 217 (9 Cir. 1960);

Claypole v. United States, 280 F. 2d 768 (9 Cir. 1960).

However, in the present case, the testimony of the co-defendant-accomplice Garcia, was in fact corroborated in all essential details by agent Saiz and agent Briggs. These corroborated facts relate to the meeting between agent Saiz, Garcia, and appellant; the

negotiation for the purchase and sale of the heroin; the eventual agreement as to the price and quantity; the going to and coming from the residence where the heroin was obtained; the return to the Bar with the heroin; and the subsequent conversation between agent Saiz, Garcia and appellant.

Credibility of corroborated testimony of a witness is to be considered by the trial court sitting without a jury and is not open for consideration by the reviewing court.

Sandiz v. United States, 239 F. 2d 239 (9 Cir. 1956);

Penosi v. United States, 206 F. 2d 529 (9 Cir. 1953);

United States v. Bailey, supra;

United States v. Coduto, supra;

Lutfy v. United States, supra.

As stated, the fact that the co-defendant pleaded guilty and was sentenced separately does not show that he testified falsely ab initio.

United States v. Aviles, supra.

3. The Trier Of Fact Believed, Beyond a Reasonable Doubt, That The Appellant Had Possession Of The Heroin.

The Findings of Fact indicate that the trier of fact believed agent Saiz and witness Garcia, rather than the story told by appellant; and that the appellant did, in fact, have possession of the heroin as charged. 5/

5/ Finding of Fact No. V [C. T. 12].

The evidence which supports the trial court's Findings of Fact regarding the question of appellant's possession of the heroin is as follows:

(1) Physical presence of the appellant at the scene of the transaction;

(2) In the middle of the transaction, at a time between the co-defendant's receiving the money for the heroin and the time of actual delivery to agent Saiz, there was a contact and conversation between co-defendant and the appellant;

(3) The appellant drove the automobile to and from the house where the heroin was obtained;

(4) Agent Briggs observed the appellant go into the house by himself and return to the automobile a few minutes later;

(5) The appellant returned to the bar with the co-defendant, having already given the heroin to the co-defendant, and at this time agent Saiz was handed the heroin.

(6) The appellant was impeached by his own statement that he had not returned to the Bar where the sale was made by agent Briggs' testimony that he observed the appellant's vehicle parked outside the Bar during this time. Appellant had testified that he kept the car with him at all times and did not return to the Bar. Additionally, agent Saiz and

co-defendant Garcia testified that appellant Torres was present at the Bar when the sale was made.

From the foregoing, it is evident that there is substantial evidence to support the trial court's Findings of Fact and that the appellant did have possession of the heroin as charged.

The authorities are endless for the proposition that findings of fact, supported by evidence, will not be disturbed on appeal.

Jensen v. United States, 362 F. 2d 891 (9 Cir. 1964);

Jue v. Ball, 299 F. 2d 374 (9 Cir. 1962);

Tonkoff v. Barr, 245 F. 2d 742 (9 Cir. 1957);

Great American Indemnity Co. v. Brown, 307 F. 2d 306 (5 Cir. 1962).

The well-settled rule is that possession may be either actual or constructive, and that proof of dominion and control over narcotics sufficient to establish possession thereof may be by use of either circumstantial or direct evidence.

Rodella v. United States, 286 F. 2d 306 (9 Cir. 1960).

In view of the substantial circumstantial evidence that appellant did have possession of the subject heroin, the evidence was sufficient to authorize the conviction.

United States v. Malfi, 264 F. 2d 147, cert. den. 361 U.S. 817.

The trial court, having thus determined that the appellant did have possession of the heroin, the fact of such possession, unless satisfactorily explained, permits the inferences that the heroin was brought or imported into the United States of America

contrary to law; that appellant had knowledge that the narcotic drug was imported or brought in contrary to law; that the heroin was distributed in or from an unstamped package; and that the appellant had knowledge that the heroin was distributed in or from a package not bearing the tax-paid revenue stamps required by law.

Harris v. United States, 359 U.S. 19
reh. den. 357 U.S. 976;

Anthony v. United States, 331 F.2d 687
(9 Cir. 1964);

Brothers v. United States, 328 F.2d 151
(9 Cir. 1964);

Medrano v. United States, 315 F.2d 361
(9 Cir. 1963);

Walker v. United States, 301 F.2d 94
(4 Cir. 1962).

VI.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez

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